

STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-4
	)	
Application for Certification for	)	
the East Altamont Energy Center	)	
<hr/>	)	

**STAFF'S COMMENTS ON THE  
ERRATA TO THE REVISED PRESIDING MEMBER'S PROPOSED DECISION**

**I. INTRODUCTION**

On May 14, 2003, the Committee presiding over the East Altamont Energy Center (EAEC) Application for Certification released the Revised Presiding Member's Proposed Decision (RPMPD) for review and comment. On June 3, 2003, the Committee held a lengthy conference to receive comments on the RPMPD. All parties were also given a subsequent opportunity to respond to comments filed by the Mountain House Community Services District (MHCSD) on June 5, 2003. On June 13, 2003, the Committee issued the Errata to the Committee's Revised Presiding Member's Proposed Decision, which also addressed various comments raised by the parties. Staff believes the changes presented in the Committee's Errata are well drafted and respond fairly to the concerns raised regarding the RPMPD. Moreover, the changes are fully supported by the record and help ensure that the project will comply with all applicable laws, ordinances, regulations, and standards.

On June 19, 2003, the applicant submitted a motion requesting additional time to comment on the Errata. Although the applicant claims otherwise, the changes presented in the Errata are based squarely on language previously debated on the record during evidentiary hearings and in comments on the RPMPD. Although further comments are only likely to re-hash arguments already made and considered by the Committee, staff offers the following comments in support of the changes presented in the Errata.

**II. AIR QUALITY**

- A. AQ-SC5 appropriately requires the mitigation of 66.8 tons of NO<sub>x</sub> to be provided on a yearly basis for the life of the project.

There is substantial support in the record for requiring the project to provide at least 66.8 tons of NO<sub>x</sub> offsets annually. (Exh. 1, pp. 5.1-1 through 72; Exh. 4G3; Exh. 5D) The San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) has identified an environmental impact within its district that is not mitigated by the Emission Reduction Credits (ERCs) already purchased by the applicant to satisfy the requirements of the Bay Area Air Quality Management District. (Exh. 4G3 p.1) The

mitigation calculation performed by the SJVUAPCD to substantiate its estimate of additional offsets needed, which the applicant accepts, uses tons per year as its sole unit of measurement. (Exh. 4G3) The project emissions are also calculated on a tons per year basis, as are the emissions required to be offset and the offsets already provided. (Exh. 4G3) Thus, the number arrived at by SJVUAPCD as the necessary amount of mitigation, 66.8, is the number of tons per year of offsets needed to mitigate the project's impact. Similarly, the second calculation offered by the SJVUAPCD arrives at project emissions in terms of tons per year. (Exh. 5D) Even all of the applicant's offset calculations contained in their Draft Consensus Air Quality Mitigation Plan are done on a tons-per-year basis. (Exh. 2CC) It follows, then, that the condition of certification specifying the level of mitigation required of the applicant should be expressed on an annual basis as well. Accordingly, the 66.8 tons of NOx identified by SJVUAPCD as necessary mitigation and accepted by the Committee should remain in AQ-SC5 as an annual level of mitigation, required for the life of the project, as supported by the record.

The applicant has previously argued that requiring an annual level of mitigation would prohibit the SJVUAPCD from using many of its offset programs to satisfy the mitigation requirement. Requiring the offsets to be provided on an annual basis would not prohibit SJVUAPCD from using any of the offset programs they have previously identified. If a program does not provide offsets for the duration of EAEC operation, then additional programs could be used to make-up the remainder of the offsets. Thus, there are no practical impediments to requiring mitigation on an annual basis.

#### B. Conclusion

Staff supports the changes to the air quality conditions of certification as contained in the Errata. Although the Errata does not adopt all of staff's recommendations, staff believes that the changes to the conditions of certification are positive and are fully supported by substantial evidence in the record.

### III. SOIL AND WATER RESOURCES

- A. SOILS&WATER 5 appropriately ensures EAEC will use recycled water to the extent that it is available and priced comparable to fresh water, and does not require anything more than what the applicant has already claimed it is willing to do.

The applicant has repeatedly stated that it intends to use recycled water. (Exh. 2 pp. 8.14-4, 8.14-6 ("the project is committed to using recycled water to the extent it is available"), 8.14-7) SOILS&WATER 5, as contained in the Errata, formalizes the applicant's stated intent. Applicant has previously claimed that a formal request for recycled water is unnecessary because of the MOU between EAEC and the Byron-Bethany Irrigation District (BBID). That MOU, however, identifies that a more detailed water agreement must be negotiated. (Exh. 2PPP p.2 ("the Parties intend to execute a water supply agreement...prior to the commencement of construction that will include...primary terms and conditions.") As identified in the condition, Water Code section 13580.7 simply sets forth a process whereby a water agreement for recycled water can be put in place.

The condition of certification contained in the Errata also appropriately references both BBID and Mountain House Community Services District as potential purveyors of recycled water. The parties have each asserted their opinions as to who has the legal right to convey recycled water to EAEC. The Energy Commission, however, is not the proper forum in which to settle the legal debate. By referencing both agencies as potential suppliers, the condition of certification remains neutral, does not usurp either agency's legal authority to provide recycled water, and leaves the parties free to resolve the matter as they see fit and in a more appropriate venue.

#### B. Conclusion

SOILS&WATER 5, as contained in the Errata, is a reasonable condition of certification that ensures that, as is claimed by the applicant, the project will indeed use recycled water as it becomes available.

### IV. COMPLIANCE AND CLOSURE

Revised footnote 28 (now 30), as presented at the top of page two of the Errata, refers to a "rulemaking on security that will promulgate guidelines applicable to all similarly situated projects coming before the Energy Commission." Because staff is unsure of exactly how the security guidelines will be established, be it through a rulemaking or other action, or the scope of their applicability, staff respectfully requests that the following words be added to the revised footnote:

However, the language requirements of **COM-9** will be subject to replacement or termination pursuant to the Commission's future rulemaking or other action on security that will promulgate guidelines applicable to ~~all similarly situated projects coming before~~ under the jurisdiction of the Energy Commission.

### V. CONCLUSION

Staff thanks the Committee for the extraordinary time and thought it has put into the Errata and preceding decisions. The RPMPD, as revised by the Errata, represents a decision that addresses the valid concerns expressed by the parties, agencies, and members of the public involved in the review of this project. If the Committee does not object, staff respectfully reserves the opportunity to provide written reply comments should they be necessary to clarify the record following submittal of the other parties' initial comments.

DATED: July 3, 2003

Respectfully submitted,

---

LISA M. DECARLO  
Staff Counsel